IN THE

Supreme Court of the United States

October Term, 1957

NO. 331

ROY JONES, Petitioner

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF ON BEHALF OF PETITIONER

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INDEX

CITATIONS

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REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the 5th Circuit in this case is officially reported in 245 Federal Reporter, 2nd Series, 32.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. 1254 (1), and under and by virtue of Title 18 U. S. C. 3772 and within the time provided for in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U. S. 661, 666, 54 S. Ct. XXXIX), and Rule 22 (2) of the Supreme Court rules.

Jurisdiction of this court is invoked because the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this court, and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision, and has misconstrued a decision of this court involving the construction of a constitutional amendment, and has, by its ruling, eliminated the necessity of a search warrant in order to search a dwelling house at night, and has decided a question of gravity and importance involving federal criminal procedure as it relates to searches and seizures without warrant based upon mere probable cause, all as provided for by rule 19 (1) (b) of the rules of the Supreme Court governing review by this court on certiorari and the grounds therefor.

The judgment of the Court of Appeals was entered on June 10, 1957. A petition for rehearing was denied July 3, 1957. The petition for certiorari was filed and docketed in the Supreme Court of the United States July 31, 1957, within 30 days after the date of the final

judgment of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) The constitutional provision of the Constitution of the United States, the construction of which is involved in this application for certiorari, is as follows:

"IV Amendment, U. S. Constitution:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(b) The statute of the United States, the construction of which is involved in this application for certiorari, is as follows:

"Rule 41 (c) Federal Rules of Criminal Procedure:

"The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time."

QUESTIONS PRESENTED FOR REVIEW

1. Whether a search of a person's dwelling house at night, and the seizure of articles therefrom by federal officers, is justified without a search warrant issuing from a magistrate when it is practicable to secure a search warrant and no justification or excuse is offered by the Gov-

ernment except some slight delay incident to preparing the necessary papers.

2. Whether the practicability of procuring a search warrant is no longer an element in determining the reasonableness of a search without a warrant.

3. Whether a search without a warrant is reasonable, within the meaning of the Fourth Amendment, because the federal officer has probable cause to search, or whether the "probable cause" provision of the Fourth Amendment is meant to prescribe the duty of the issuing magistrate,

4. Whether federal officers acting on probable cause, and without a search warrant, are authorized to conduct a search of a dwelling house at night where there exists no pressing emergency or other reasons justifying their action, and under such circumstances that a United States Commissioner, acting under and by virtue of Rule 41 (c) of the Federal Rules of Criminal Procedure, would be required to have positive affidavits before authorizing such a search.

5. Whether the decision by this Court in the case of United States versus Rabinowitz, 339 U. S. 56 stating that: "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable," eliminates the necessity of a search warrant in all cases where probable cause for the search exists, or whether the decision in that case is applicable only in cases where the search is made incidental to a lawful arrest.

STATEMENT OF THE CASE

Petitioner was indicted on four counts for violating the Internal Revenue laws of the United States relating to liquor in the United States District Court for the Northern District of Georgia, Gainesville Division (R. 1 and 2). Prior to the trial of the case on its merits petitioner filed a written motion to suppress certain evidence (R. 3) on the ground that said articles were unlawfully and illegally seized from his residence by federal officers without lawful warrant or authority and without the consent of the movant. This issue was tried by the court, and upon the hearing evidence was introduced by petitioner and found to be true by the court that five officers raided the home of petitioner (R. 50 and 54) at night without a nighttime search warrant and found therein a distillery consisting in part of an upright boiler with a blower burner and 2400 gallons of mash with hose pipes and a small quantity of non-tax paid liquor (R. 54).

From the findings of fact made by the trial judge it appears that the federal officers had the premises in question under surveillance for two or three days. During this constant surveillance they were able to ascertain and assert a belief under oath that there was an illicit distillery located in the home of Roy Jones (R. 53). During the day of May 2nd one of the officers appeared before the U. S. Commissioner in Gainesville, and made affidavit stating on information and belief that there was an illicit distillery on the premises (Mov. Ex. 2, R. 5 and 51). Upon this affidavit, the Commissioner issued a daylight search warrant (Mov. Ex. 1, R. 4 and 51).

The trial judge found that although the officers had ample opportunity to execute their daylight search warrant during the daylight hours they did not do so but "desiring to seize any vehicles engaged in removing the illicit liquors they did not immediately execute the daylight search warrant * * * * but remained on watch until after dark and until about 9:00 o'clock P.M." (R. 53).

At that time the officers attempted to gain entrance into the dwelling of Roy Jones who was not at home at that time. Mrs. Jones attempted to block the doorway requesting the officers to wait until her husband arrived (R. 8). A twelve year old son of the appellant obtained a shotgun and held it in a threatening manner, in an attempt to keep the officers from searching the premises (R. 37, 38). Mrs. Jones asked the officer if he had a search warrant and he stated that he did not need one (R. 38). They then searched the house and seized the contraband articles.*

Five officers were present at the time of the raid, and there were only two or three doors to the dwelling and it would have been possible for the officers to watch each of the doors and still send another officer for a night-

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* Inasmuch as petitioner believed that the findings of fact by the trial judge were sufficient to show all the pertinent facts we omitted all the evidence from the printing of the record in this court. The Solicitor General designated a portion of the evidence to be printed and omitted the testimony of Mrs. Roy Jones, the wife of the petitioner. While we do not insist that the evidence is essential to the issues involved, we have attached a portion of the testimony of Mrs. Roy Jones as it appears in the original record from the U. S. Court of Appeals for the Fifth Circuit, as on file in this court (see Appendix), in order that this court may have the opportunity of reading the evidence of the methods used by the officers to gain entrance into the home of Roy Jones. While the methods used by the officers are not technically a legal ground for the suppression of the evidence, they serve to illustrate the viciousness of the raid.

time search warrant had the officers even deemed this to be necessary (R. 54).

The trial court concluded that the federal officers had "probable cause for the search" at the time the search was made (R. 54) and held that the search "was not unreasonable and did not violate the Fourth Amendment" due to the existence of their probable cause "even though the officers had time to obtain a nighttime search warrant." (R. 55.)

The trial judge, in so holding, relied upon and cited United States versus Rabinowitz, 339 U. S. 56. The motion to suppress was then overruled and denied and the United States Court of Appeals for the Fifth Circuit affirmed this ruling holding that "the findings warranted, indeed required, the conclusions of law reached by the court and the overruling of the motion to suppress." (R. 59.) A petition for rehearing was filed by petitioner (R. 64) within the time prescribed by the rules, and denied by the Court of Appeals (R. 68).

ARGUMENT AND CITATION OF AUTHORITY

Petitioner has presented elsewhere in this brief five (5) questions for review in this case. While all five of these questions fall within the general question presented we will attempt to classify them as succinctly as possible.

(1 and 2) Practicability of Procuring Warrant

No question of fact arises in this case as to the practicability of procuring a search warrant to search the home of the petitioner. The trial judge determined in his findings of fact that there were a sufficient number of officers present to guard the doors of the house while

another officer could have sought a magistrate to procure a proper warrant. Although the trial judge recognized that it was practicable for the officers to procure a night-time search warrant, he did not believe the element of practicability to be necessary in order to sustain the validity of a search and seizure of a person's home at night or the invasion of his privacy. In so holding the trial judge relied upon the case of

> *United States v. Rabinowitz,*
> 339 U. S. 56, at page 66

holding that "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

Petitioner respectfully submits that this court did not, in the Rabinowitz case, supra, eliminate practicability as one of the considerations tending to show unreasonableness of a search. The Rabinowitz case, supra, involved the validity of the search of a person's room *as an incident to a lawful arrest upon a valid warrant of arrest.*

In Trupiano v. United States, 334 U. S. 699, (68 S. Ct. 1229,) this court held:

> "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants *wherever reasonably practicable.*"

In the Rabinowitz case, supra, this court said:

> "To the extent that Trupiano v. United States requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search *after a lawful arrest,* that case is overruled."

It can be seen that the Rabinowitz case does not completely overrule the Trupiano case, but does so only in cases where the search was made *"after a lawful arrest."* No such question is involved in the case at bar.

The Rabinowitz case, supra, involved an arrest upon a valid warrant. This court, on this point, held:

> "Of course, a search without warrant incident to an arrest is dependent initially on a valid arrest."

The search in this case was not dependent initially on a valid arrest. The rule as stated by this court in Trupiano, supra, was not changed in any way by Rabinowitz, supra, except only insofar as it may have applied to those cases where searches were made *incidental to valid arrests upon valid warrants of arrest.*

In the case of Johnson v. United States, 333 U. S. 10, (68 S. Ct. 367,) where evidence of opium was suppressed because of entry into the hotel room of defendant without a warrant, but based on probable cause, it was held:

> "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.
>
> "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay

necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear.

"But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.

"If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required."

This court later, in the case of United States versus Jeffers, 342 U. S. 48, (72 S. Ct. 93,) recognized the rule laid down in the Trupiano case, supra, to be applicable to the facts of that case where the search was made *not as an incident to a valid arrest.* The court said:

"Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. See Weeks v. United States, 1914, 232 U. S. 383, 34 S. Ct. 341; Agnello v. United States, 1925, 269 U. S. 20, 46 S. Ct. 4. Only where incident to a valid arrest, United States versus Rabinowitz, 1950, 339 U. S. 56, 70 S. Ct. 430, or in 'exceptional circumstances,' Johnson v. United States, 1948, 333 U. S. 10, 68 S. Ct. 367, may an exemption lie, and then the burden is on those seeking the exemption to show the need for it.

McDonald v. United States, 1948, 335 U. S. 451, 456, 69 S. Ct. 191."

The Jeffers case, supra, being the latest decision of this Court upon the subject, recognizes it as the rule that a search warrant is necessary to sustain the validity of a search, and that but two exceptions are known, to-wit: (a) incident to a valid arrest, and (b) in exceptional circumstances. The case at bar does not fall into either of the two stated exceptions. The trial court and the Court of Appeals in the case at bar uphold the Rabinowitz case, supra, as the *rule* instead of one of the known *exceptions* to the rule.

The facts in the case at bar resemble very strongly those of Taylor v. United States, 286 U. S. 1, (52 S. Ct. 466) wherein this court entered a reversal of the judgment based on a search and seizure without warrant during the night.

(3) Probable Cause Determinable by Judicial Officer

Facts showing probable cause for the search of a dwelling can never supply the necessary ingredient of a valid search warrant in cases where none of the known exceptions are present. The language of the Fourth Amendment is that "*no Warrants shall issue, but upon probable cause;*" not that *no searches or seizures may be made, but upon probable cause.* This portion of the Amendment does not measure the standard or fix the weight of the evidence by which searches may be conducted without warrants; it prescribes the duty and limits the power of the judicial officer vested with the authority to issue the warrant.

In the case of Agnello v. United States, 269 U. S. 20, (46 S. Ct. 4,) it was held:

> "Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. Absence of any judicial approval is persuasive authority that it is unlawful. See Entick v. Carrington, 19 Howard's State Trials, 1030, 1066. Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. *And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.*" (Italics added.)

The rule requiring search warrants where they can be obtained practicably is a sound one, and necessary to retain our freedom under our Constitution. In United States versus Lefkowitz, 285 U. S. 452, (52 S. Ct. 420,) it was held:

> "Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

(4) Mere Probable Cause Not Sufficient to Authorize Nighttime Search

Rule 41 (c) seems clear and unambiguous as to the duties of federal judicial officers relative to the issuance of search warrants. The mandate of the rule is that "The

warrant shall direct that it be served in the daytime," and the only exception is to the effect that "*if the affidavits are positive* that the property is on the person or in the place to be searched," then the magistrate *may* direct "that it be served at any time."

In the case at bar the officers had complied with this rule and a U. S. Commissioner in Gainesville had issued the warrant authorizing them to search the premises in question "*during the daylight hours.*" In order to have authorized the search at the time during which the officers were proceeding a federal judicial officer would have been required to have before him *positive affidavits* that the property was in the place to be searched. Without it, the entire judicial authority of the United States government would have been powerless to have authorized such a search.

Did these officers have *positive evidence* such as would have authorized a magistrate to issue a search warrant directing that it be executed during the night season? The trial judge found that "the officers had reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the *belief* that Roy Jones was guilty of the offense of operating an illicit distillery in his home." (R. 55.) We respectfully submit to this court that such facts as these, under Rule 41 (c), would not have been sufficient in themselves to have authorized a federal judicial officer to issue a warrant directing a search at night. We further respectfully submit to this court that law enforcement officers have never had greater power conferred upon themselves than judicial officers.

The raising of this issue in this certiorari serves to illustrate that had one of the officers attempted to procure a search warrant before making the raid on petitioner's home, he would have discovered that, under federal law, a search warrant directing a nighttime search would undoubtedly have been refused. If the agents then determined to make the search and seizure without the benefit of such warrant the seizure would have been unquestionably illegal.

To hold in this case that law enforcement officers have the right to conduct a search of a person's home at night without a proper warrant founded on positive affidavits would mean that United States Commissioners are without authority to issue search warrants directing officers to search dwelling houses at night based on mere probable cause, but the mere enforcement officer may do so without such a warrant or authority. This would lead to an ultimate and utter destruction of the true meaning and intent of the Fourth Amendment and Rule 41 (c).

(5) Probable Cause Does Not Eliminate Necessity of Search Warrant

The trial judge in the case at bar held:

> "If the officer has no warrant he must show probable cause."

If this is the law search warrants are no longer necessary in any case, and the Fourth Amendment is reduced to a mere scrap of paper. Rule 41 (c) requires as a condition precedent to the issuance of a valid search warrant that there must be (1) sworn evi-

dence of probable cause to authorize a warrant to be issued directing a daylight search, or (2) sworn evidence of positive facts to authorize a warrant to be issued directing a nighttime search.

This inevitably means that probable cause is at least a necessary element before a magistrate may act, therefore an officer must have at least probable cause in order to procure a valid warrant. However, according to the trial judge's ruling in this case such officer could dispense with the necessity of a warrant so long as he had probable cause to conduct the search without one.

Consequently no search warrant would be necessary at all. In other words, probable cause is a condition precedent to a valid search warrant, but where the condition precedent is in existence no warrant would be necessary. This undoubtedly can not be the law, because if it were it would bring about the complete and utter destruction of the need for impartial magistrates to protect persons from unlawful searches and seizures by zealous law enforcement officers who would be empowered to act on their own discretion.

CONCLUSION

Here was a raid by five agents representing the power and majesty of the combined efforts of both the United States government and the State of Georgia against an illiterate and defenseless woman and her twelve year old son, trying to protect their home until the husband and father returned; a raid that would do justice to a police state in the hey-day of its reign. Were it not for the fact that a violation of federal law was later discovered by

these agents as a result of their unlawful acts and a prosecution instituted against the head of the house, this greater and most serious breach of humanity and constitutional rights would have undoubtedly gone unnoticed by the courts; for it is not the innocent victims of unreasonable and unlawful searches who eventually bring such wrongs to light, but those against whom the agents of the government achieve their greatest success; and so, in order to protect the innocent from this same type of deprivation of constitutional privilege and immunity it becomes essential to free the petty law violator in order to place the stamp of disapproval on the lawless acts of the men whose duty it is to uphold the constitution and enforce the laws of this land.

Petitioner in certiorari contends that the judgment of the United States District Court for the Northern District of Georgia overruling and denying the motion to suppress the evidence was erroneous, and that such error was so substantial as to render all further proceedings nugatory. Petitioner in certiorari also contends that the United States Court of Appeals for the Fifth Circuit, in affirming the District Court per curiam, committed reversible error.

Inas. uch as the trial court took into consideration, in arriving at a guilty verdict, the illegally obtained evidence against petitioner, (R. 56.) he is entitled to a new trial in order that he may be tried only upon whatever evidence was lawfully obtained against him.

The judgment of the United States Court of Appeals for the Fifth Circuit in this case should be reversed

with direction to the United States District Court for the Northern District of Georgia to vacate the judgment of conviction and sustain the motion to suppress the evidence complained of by petitioner in his motion to suppress.

Respectfully submitted,

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February, 1958.

APPENDIX

(Folio 24)

MRS. ROY JONES, having been sworn, testified as follows:

Direct Examination.

By Mr. Asinof:

Q. State your full name, please, ma'am?

A. Katie Lee Jones.

(Folio 25)

Q. Katie Lee Jones. You the wife of Roy Jones?

A. Yes, sir.

Q. Were you present—were you living with your husband on May 2 of this year?

A. Yes, sir.

Q. State to the Court what happened on the night of May 2, anything unusual that happened around your home?

A. Well, we had been to Dawsonville to carry our kids to a play down there.

Q. Who is "we"?

A. Me and my sister, and both of our kids, her kids and mine.

Q. I see. All right.

A. And we drove, when we come back we drove up in the yard, and—

Q. That is the yard of your home?

A. Of my home, yes. So one of them jerked the car door open and said, "Git out of there." I says, "We ain't got nothing in here but kids."

Q. You say "one of them." Who are you speaking about?

A. Well, one of them law, they said they was law.

Q. One of the officers?

A. Yes, I don't know which one.

Q. All right.

A. So when he done that, I jumped out on the other side, so I reckon we both got to the door about the same time, and I said, "Don't come in here," and he says, "I'm coming in." I says, "You ain't coming in here," I says, "You can wait until Roy gets here." He said, "I ain't waiting," he says, so I kept pushing him back, and they kept slinging me against the side of the wall, and I come back and I kept pushing and he would keep slinging.

(Folio 26)

Q. When did you learn that they were officers?

A. Well, I wouldn't say just how long, but it was a good little bit, until Woody come up—he said he was Woody—he said, "I'm federal law," I said, "If you're federal law, let's see your warrant," he said, "I don't need a warrant," and I asked him to wait until Roy come.

Q. What did he say?

A. He says, "We don't wait," so he kept pushing and I kept pushing back, and they'd sling me first one way and the other, but then I'd come back on them and there's one of them, that little old, I don't know which one he was, a little short one, he told my little boy, says, "You stand back or I'll slap your brains out," and I says, "You won't put your hands on my kid."

Q. How old is that little boy?

A. Well, he was twelve at that time. I says, "You won't put your hands on my kid." He says, "I'll slap his damn brains out,"—and they was another one there,—he said to that other one, says, "Here, put these handcuffs on her." He slapped my hands behind me and got one of the handcuffs on me, and Woody come up and says, "You take the handcuffs off of her," so he took the handcuffs off of me.

Q. Do you remember which officer it was that put the handcuffs on you?

A. Yes, I do.

Q. Can you point him out? Is he in the courtroom?

A. That one right over there.

Q. On the—

A. And he told that other one, says, "Throw her down in the floor and put your foot on her," that one right there did.

(Folio 30)

Q. And they didn't do anything to you except to go past you and get into the house?

A. No, they, I was at the door and they pushed me against the side of the door, and I runned in front of them again, and they would push me back up against the wall, and I'd come back, and I'd push at them again, and when they'd put their feet and skinned—well, they had skint my feet all over, a-kicking, I reckon, or stomping as I was pushing them backwards—

Q. Every time they attempted to come into the house, you jumped back and tried to push them out?

A. I'd get in front.

Q. And if you hadn't done that, they wouldn't have had to push you any place?

A. No, if I hadn't of got in front of them—I was asking them to wait until Roy got there.

Q. Did you shout to the people in the truck that was stuck in the driveway, to turn out their lights?

A. No, sir, I didn't.